

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

United States :  
 :  
v. : No. 3:01cr106(JBA)  
 :  
Wander Morel :

Ruling and Order [Docs. ##81, 82]

On July 16, 2002 Wander Morel filed a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence. On April 21, 2003 the Court issued a Ruling [Doc. #79] denying the petition and determining that no Certificate of Appealability would issue because Morel had failed to "ma[k]e a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). On June 16, 2003 the Clerk's Office received a "Notice of Appeal Nunc Pro Tunc" [Doc. #80] from Morel, the cover letter for which was dated June 11, 2003. The cover letter to the Clerk explains that although the Court's Ruling was dated April 17 and postmarked April 21, Morel "was not provided the mail by a correctional officer [until] June 1, 2003." [Attachment to Doc. #80]. On July 17, 2003, Morel filed a motion to proceed in forma pauperis on appeal,<sup>1</sup> and for appointment of counsel on appeal.

To the extent Morel's cover letter to the Clerk explaining his tardiness in filing the Notice of Appeal is construed as a

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<sup>1</sup>See Fed. R. App. P. 24(a)(1) (specifying that motion to proceed in forma pauperis on appeal must be made first to the district court).

request to extend time to file the appeal, the Court lacks jurisdiction to grant such request. Because a Notice of Appeal in a criminal case must be filed within 10 days of "the entry of the judgment or the order being appealed," Fed. R. Civ. P. 4(b)(1)(A)(i), Morel's Notice was due by May 5, 2003 (ten business days after April 21, 2003). While Fed. R. Crim. P. 4(b)(4) permits the district court, "[u]pon a finding of excusable neglect or good cause," to extend the time period for filing an appeal, such extension cannot "exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)." Fed. R. Crim. P. 4(b)(4).<sup>2</sup> Thus, the time period could be extended, at most, to June 4, 2003 (thirty days after the original due date). Inasmuch as Morel's Notice was not filed until June 11, 2003 at the earliest,<sup>3</sup> Morel's Notice would be untimely in any event.

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<sup>2</sup>See also Advisory Committee Notes to 1998 Amendments to Rule 4(b) ("The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so provided that the extended period does not exceed 30 days after the expiration of the time otherwise prescribed by Rule 4(b).") (emphasis added); Melton v. Frank, 891 F.2d 1054, 1056 (2d Cir. 1989) (district court lacks jurisdiction to extend time for filing a notice of appeal beyond the allowable limits set out in Fed. R. App. R. 4).

<sup>3</sup>While the Notice was received in the Clerk's office on June 16, 2003, Morel's Notice is considered timely filed as of the day he handed it to prison officials, see Houston v. Lack, 487 U.S. 266 (1988), which could have been no earlier than June 11, the date on the cover letter.

While at least one circuit has adopted a "reverse Houston" rule under which the time for filing a Notice of Appeal (here, 10 days) does not begin to run until prison officials actually deliver notice of entry of the judgment or order being appealed, see United States v. Grana, 864 F.2d 312 (3rd Cir. 1989)<sup>4</sup>; but see Jenkins v. Burtzloff, 69 F.3d 460 (10th Cir. 1995) (declining to follow Grana), the question of whether the Second Circuit will adopt such a rule is for the Court of Appeals to determine in the first instance, as it relates to that court's jurisdiction and is not a question specifically entrusted to the district court. Compare, e.g., Fed. R. Civ. P. 4(b)(4) (motion to extend time to file appeal must be made to district court).

Morel's motion to proceed in forma pauperis on appeal is denied. While Morel may (as he claims) have no assets, the Court

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<sup>4</sup>The Grana court explained:

The teaching of Houston is that prison delay beyond the litigant's control cannot fairly be used in computing time for appeal. We perceive no difference between delay in transmitting the prisoner's papers to the court and transmitting the court's final judgment to him so that he may prepare his appeal. In keeping with the teachings of Houston and Smith, and our desire to avoid creating technical pitfalls to hearing appeals on the merits, we hold that in computing the timeliness of pro se prisoners' appeals, any prison delay in transmitting to the prisoner notice of the district court's final order or judgment shall be excluded from the computation of an appellant's time for taking an appeal.

Id. at 316.

concludes for the reasons set out in its Ruling on the § 2255 motion that no appeal would be taken in good faith, and thus 28 U.S.C. § 1915(a)(3)<sup>5</sup> mandates denial of the motion to proceed in forma pauperis. In light of this ruling, Morel may address his request to the Court of Appeals. See Fed. R. App. 24(a)(5). The motion for appointment of counsel on appeal is also denied, as it is more properly presented to the Court of Appeals and in any event the issues to be raised on appeal lack merit.

For the reasons set out above, no extension of time pursuant to Fed. R. App. P. 4(b)(4) will be granted and the motions to proceed in forma pauperis on appeal [Doc. #81] and for appointment of counsel on appeal [Doc. #82] are DENIED.

IT IS SO ORDERED.

/s/

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Janet Bond Arterton, U.S.D.J.

**Dated at New Haven, Connecticut, this 28th day of August, 2003.**

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<sup>5</sup>"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."